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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. HASSAN LEE BRATCHER, Defendant and Appellant.	A153480 (Alameda County Super. Ct. No. 17-CR-012238)

A jury convicted Hassan Lee Bratcher of the kidnapping and rape of Jane Doe. During deliberations, the jury sent a note to the trial court stating one of the jurors refused to follow the court's instructions. The trial court interviewed each of the jurors who wished to discuss the note in chambers and ultimately concluded the jury foreperson must be excused because he had prejudged the case and had based his decisions on information not introduced at trial. The court excused the foreperson and replaced him with an alternate juror. The reconstituted jury subsequently found defendant guilty.

Defendant raises several issues on appeal, most salient of which is his claim the trial court erred and violated his constitutional rights by discharging the foreperson. After careful review, we conclude the record does not reflect a demonstrable reality that the juror committed misconduct. Although we acknowledge the difficulty of the inquiry trial courts face when addressing allegations of juror misconduct, on this record, we are compelled to reverse the verdict.

I. BACKGROUND

A. *Factual Background*

Because most of the facts of the underlying crimes are not relevant to our decision, we provide only a brief summary of them.

In March 2017, Jane Doe, a 33-year-old intellectually disabled pregnant woman was taking the bus from the shelter in Oakland where she lived to attend Sunday school and services at her church. After she got off the bus and was walking toward her church, she saw defendant, who was sitting in the driver's seat of a van stopped in the middle of the street. Defendant told Jane Doe that he knew her. Jane Doe did not know defendant, but he was being nice, and she asked him for a ride to church because she was having trouble walking due to her pregnancy. Defendant agreed, and Jane Doe entered his van. Jane Doe testified defendant drove her to several different locations and raped her repeatedly.

A sexual assault response team (SART) examination was performed on Jane Doe by Physician's Assistant Martin Moran. At trial, Moran testified as an expert about the results of his examination, including injuries he observed to Jane Doe's genitalia.

Jane Doe's sister testified at trial that Jane Doe had called her twice from a Walgreens to tell her she had been raped. The trial court admitted the sister's testimony for the limited purpose of establishing a complaint was made and the circumstances under which it was made.

B. *Relevant charges*

Defendant was charged by amended information with kidnapping with intent to commit a sex crime (Pen. Code, § 209, subd. (b)(1); count one) and forcible rape (*id.*, § 261, subd. (a)(2); count two). The amended information also alleged two enhancements on the forcible rape charge for kidnapping and movement of the victim that substantially increased the risk of harm to her over and above that inherent in the commission of the offense. Defendant pled not guilty and the case proceeded to trial.

C. *Jury Deliberations*

During the course of jury deliberations, the jurors sent several notes to the court, including two notes describing their difficulty in reaching consensus. The first note, sent on the third day of deliberations, read: "We are currently unable to reach a consensus decision on count 2, after a day and a half of intense effort. We request some assistance in reaching agreement. We plan to begin deliberation on count 1." In response, the court read the jury CALCRIM No. 3551, the instruction on further deliberations when the jury is deadlocked. The trial court also suggested the jury might consider trying new methods for its deliberations "to ensure that each juror has a full and fair and impartial opportunity to express his or her views and consider and understand the views of the other jurors." The court reminded the jurors they could request readback of testimony, and suggested they reread CALCRIM No. 200 on the duties of a juror. The court further instructed the jurors they must "determine what facts have been proved from the evidence received in the trial and not from any other source," they must follow the court's instructions on the law, and reiterated that their decisions must be "based on the evidence received in trial and the instructions given by the court." The court asked the jury to articulate the assistance it felt it needed in a note to the court and ordered the jury to continue its deliberations.

After another day and a half of deliberations, the jury sent out the following note to the court: "We are currently deadlocked on both counts, and have been so for over two days. We are not sure what we can and cannot ask for, or how you can or cannot help us. We are all looking for a way to come to resolution on this case. The majority of the jury believe an individual has not reached their conclusion in accordance with the jury instructions." The note purported to be from Juror No. A61, the foreperson.

The court discussed the note in chambers with counsel, then stated on the record its concerns about the note. The court emphasized its biggest concern was that "the majority of the jury believe an individual has not reached their conclusion in accordance with the jury instructions," and stated, "I need to know what that means." The court said it was considering having the jurors who were comfortable speaking with the court do so

on the record, in chambers, individually with the court and counsel. The prosecution agreed the court had a duty to investigate whether a juror was not following the law. Defense counsel objected to the court engaging in an "unfettered back and forth with the jury" either collectively or individually and suggested the court communicate with the jury in writing as to whether they had concluded their deliberations and just could not reach a verdict, and if so, declare a hung jury.

The court ruled: "Sounds like they're asking for help and it sounds like they think that there's a problem, so the court has a duty to address that." Eleven of the 12 jurors agreed to speak with the court. The court brought each of those jurors into chambers and asked each essentially the same question—what the jury meant by the statement: "The majority of the jury believe an individual has not reached their conclusion in accordance with the jury instructions."

D. *Trial Court Inquiry of Jurors*

The trial court first called the foreperson, Juror No. A61, to chambers and asked him to respond to the note. Juror No. A61 told the court: "Ironically, I am the individual juror that has been challenged by [the] other people. And I can only honestly say that I feel like I have followed every instruction. I paid very close attention to your initial reading of the instructions. And I believe it was Thursday morning when several members of the jury wanted to reread the entire instructions. I felt like I didn't need it, but I listened to it. And both times I listened to the instructions as they apply to some conclusions that I had been drawing or some conclusions as the individual facts, opinions. And I scrutinized very carefully whether I had misapplied some instruction or failed to follow some instruction. [¶] . . . [¶] . . . And I honestly feel like I've tested and retested myself to make sure that I have stayed within the rules." He told the court he had written the note "At the request of other people."

When the court asked Juror No. A61 if he knew why the other jurors were saying he was not following instructions, he said, "Actually, I do. And while I can't remember all the individual sections, whenever they brought it up, I specifically answered each thing that they said. And I'm not implying anything, but I have a feeling that it actually

goes to a frustrating difference of opinion. I honestly believe that." The court told Juror No. A61 it might call him back after it had a chance to speak with the other jurors "[b]ecause [the court would] get more information and we'll see where we are." Juror No. A61 said he thought that would be appropriate and said, "I would prefer that—to be called back. I would love that."

The court called the remainder of the jury members into chambers individually and asked each the same initial question about what the note meant. Juror No. A43 told the court that Juror No. A61 said "clearly" on the first day of deliberations that he had already made up his mind and that it was not going to change. Juror No. A43 said Juror No. A61 took the position that the testimony of Jane Doe's sister "didn't do certain things to prove the case." Then the jury looked at the instructions and "kind of decided that the instructions tell us that that testimony is not supposed to prove that part of the case. Then we just stopped talking about it. The position didn't [waver]." Juror No. A43 also noted Juror No. A61 kept falling back on "possibilities and things that could have happened. And since it's a possibility, we can't argue that it did or did not happen. So he kind of takes that as a success in his position, since it's a possibility that he imagined we can't disprove."

Juror No. A43 said with regard to the SART examination, Juror No. A61 "cited as his personal experience or, you know, just input as a juror that he knows things like that can happen with porn stars. And so it's valid that we should think of that as a possibility. And so, basically, just cited pornography for us." Juror No. 43 then said later the jury addressed "whether or not that was appropriate. And then he said that that was a mistake. It's from somewhere else, but then we didn't talk about it anymore." When asked by the court for clarification, Juror No. A43 said, "[B]asically [Juror No. A61] just said porn stars sometimes find themselves with their genitals in that state, so it's a common thing. [¶] . . . [¶] . . . And then when we tried to push that porn stars is [*sic*] not a common situation, he retracted and said, oh, no. I got that from something I read somewhere else. But he still held it."

Juror No. B14 told the court Juror No. A61 discarded all of Jane Doe's testimony because he felt she made up the story and the prosecution led her through it—that in spite of the court overruling defense objections to her testimony, Juror No. A61 still disbelieved her. Juror No. B14 said Juror No. A61 "felt like [Jane Doe] was remembering a story and [Juror No. A61] wouldn't consider . . . police evidence [or] the statement." Juror No. B14 also said Juror No. A61 "felt . . . the SART exam was questionable" and did not treat the expert witness, Moran, as an expert because he was not asked about (and did not know about what happens in) consensual sex. Juror No. B14 said they had "gone round and round about Jane Doe and just throwing out all of her testimony because she's not credible because of her affect." Finally, Juror No. B14 indicated Juror No. A61 had wanted to "use" testimony by Jane Doe's sister but when the jury "found out it was hearsay, that was a way that convinced him that he couldn't use that."

Juror No. B54 told the court that Juror No. A61 was "throwing out . . . witness testimony, basing it on the questions being leading coming from the attorneys rather than the actual evidence." Specifically, he said Juror No. A61 felt Jane Doe was being "completely led in her entire story, so he doesn't want to accept it," and as a result, the jury was unable to reach agreement on the charges. Juror No. B54 also said Juror No. A61 was "using information that wasn't included in evidence, in saying that it was all consensual. Just his reasoning on how he got to that isn't based on evidence in the case." When asked for an example, Juror No. B54 said: "Well, a good example I can use would be he uses his own opinion. Let's say the SART exam. You know, he says it was just rough sex from a consenting . . . person. He believes that she is . . . feeble-minded enough to be talked into that situation and that's consent to him. Even though, you know, we could agree that she said no and wanted to do something else. But that's also the problem. We can't use that because he's thrown out her testimony of even saying no." When asked about Juror No. A61 using information from outside of the trial, Juror No. B54 replied that he uses "[h]is own opinion, basically, of what he thinks. . . . He just [(that day)] used something that he read that spoke to the tearing in the SART exam as

being equated to rough sex. . . . [¶] . . . [¶] . . . He said he read it before the trial and he brought it up as a reason."

Juror No. C28 told the court that the handwriting on the note was his or hers and offered three "specifics" regarding the meaning of the note. First, Juror No. C28 said Juror No. A61 "had come to a conclusion before we began deliberating together" and explained that when jurors raised questions with this individual, "everything is brought up in the past tense as in, I considered that. I reviewed that. I looked at that. And so, . . . I believe he began deliberations before we were as a group." Second, Juror No. C28 stated, "[W]hen considering consensual evidence, you are to consider only reasonable alternatives. And there have been a number of cases where this individual has brought up evidence—has drawn conclusions from evidence that do not strike me or other jurors as reasonable." Third, Juror No. C28 said with regard to basing decisions on evidence outside the courtroom, Juror No. A61 had the belief that Jane Doe's injury had been seen in people who star in pornographic films, which was never introduced in court proceedings.

Juror No. C18 told the court Juror No. A61 was making decisions "not based on the evidence that was presented in the courtroom" and thus reaching "unreasonable conclusions."

Juror No. C26 said: "[W]hen we first got together as [jurors], we went around the table just to take a feel of what we thought we saw with the evidence and how we would approach this, and this juror immediately started out saying, you know, as I was watching this, I was thinking one thing, and then I got a thought in my head and I started thinking something else. And for one thing, it wasn't in evidence. For another thing, it was out of order." Juror No. C26 said the foreperson then stated his opinion "[t]hat the sex was consensual, that this was not a kidnapping, that this was not a rape, and I don't think I can be shaken from this. This is day one, the first conversation around the table." Juror No. C26 explained they had not even organized themselves at that point yet, but "we did deliberate a fair amount to try and get deeper under the covers of what specific attributes had to be proven for the primary charge of rape. . . . [¶] And we didn't seem to make any

progress whatsoever with him. In fact, every time . . . we would make points, that it seemed to cause him pause, he'd stop, he'd think about it and then he'd come back, nope. I still see it my way. He just kept on that."

Juror No. C26 added: "He's not a bad guy or anything. He's really smart, he's really thoughtful, and I actually appreciate him. But it seems he's made up his mind and he's not letting it go." Juror No. C26 also told the court the jury had taken its advice to heart. "This is a great group. We're working together. We're all respectful. It gets emotional sometimes. And for all of it we probably tried four different approaches in varying degrees of logic. And we tried to really narrow it down . . . . And it seems . . . he's making assumptions on stuff that's not in evidence."

Juror No. A10 said the foreperson was not following the court's instructions because he had "already made up [his] mind before we went into deliberation, discussing what we have heard, the evidence that was presented" and that he was "looking outside of the scope of the evidence." Juror No. A10 said Juror No. A61 was relying on a lot of presumptions or "what if[s]" that were not for the jury to consider.

Juror No. B68 also said, "I believe that [Juror No. A61] came to a conclusion before we ever deliberated. Without going into too many details, the first day he pretty much had his mind set before we went over the evidence of the case." Juror No. B68 also felt Juror No. A61 did not listen well to women. She said, "He threw out Jane Doe's testimony at the beginning. As women, we were trying to explain things as women that men might not understand. It's totally ignored. It's, like, move on. Let's talk to someone else."

Juror No. B72 was "the one person on the jury who believed that [Juror No. A61] did reach the decision understanding what the instructions were. So I believe that person did and simply disagreed with the others. And I also disagreed with that person, though I . . . think that person thought it through very clearly and did understand it and just did come to a different conclusion than the others, including me."

Juror No. A46 said from "day one" Juror No. A61 had a "predetermined mindset" and was "not open to the variety" and "As many people as there are in that room, we

approached this thing that many times. . . . It feels like you're driving this thing with ego versus reason and it's not working. And his defiance just doesn't . . . make sense." Juror No. A46 said Juror No. A61 was not open to "[d]iscussion, different approaches, reexamination of every bit of the evidence, accepting the facts are the truth or the evidence . . . . [h]e's not open to the possibility of what 11 other people in that room have come to."

After this inquiry, the trial court remarked: "I've heard some things that are concerning [*sic*] and I've heard some things that are what they're supposed to do." The court queried whether or not the court should bring Juror No. A61 back for further questioning, then stated, "He has indicated his response to the question that was raised to the court. I don't feel that I need to bring him back here to defend or anything. I think it would be uncomfortable to do that. And I don't necessarily think that that's appropriate." Though defense counsel later asked the court to allow Juror No. A61 an opportunity to respond to some of the claims raised against him by his fellow jurors, the court said it was "not going to have unfettered back and forth."

After hearing argument from both defense counsel and the prosecution, the court made its ruling. The court observed nine of the jurors "repeated the exact same thing," that Juror No. A61 had reached his decision before deliberations began. The court said: "Several of the jurors said that on the very first discussion that they had on the first day when they were sitting around the table, the juror came in, indicated that he made up his mind about what happened and was not going to change it. That was what was said by one of the first jurors who came in and spoke with us. [¶] Another juror said that Juror A61 said that he made up his mind, he knew what happened and that he was not likely to be shaken from his opinion. That was the common theme in all of the jurors who we spoke with yesterday, that it appeared that the Juror A61 had reached his decision prior to any deliberations occurring." The court also referenced the comments by one juror that Juror No. A61 spoke in the past tense, as in, "Oh, I've already considered that, I've already thought about that, I've already reviewed that. And that was before they had started the deliberations."

"The second huge problem," the court observed, was that the Juror No. A61 was "basing his decisions and conclusions on information that was not in evidence." The court noted a lot of the statements related to the SART examination where Juror No. A61 relied on his own knowledge and ideas about injuries experienced by porn stars during consensual but rough sex and noted Juror No. A61 used that information in assessing the testimony from Mr. Moran. The court also found Juror No. A61 based his information on prior articles he had read and possibilities and speculation he imagined that were not in evidence.

Based on all of the jurors' statements, the court concluded the demonstrable reality standard had been met. The court found Juror No. A61 had prejudged the case and based his conclusions and reasoning on evidence that was not presented during the course of the trial. In summarizing its ruling, the court said: "I do think that from the information that the court learned from the jurors yesterday, we have a situation of prejudging the case, we have a situation of receiving and injecting information learned from outside of the trial into the deliberations, we have a situation of a juror who's injecting an opinion based on specialized information obtained from outside sources, we have a juror who has consulted reference works or other sources outside of the evidence in the case for additional information. We also, I think, have a situation where we have a juror who is expressing an opinion to other jurors based on the juror's personal expertise or specialized knowledge that goes beyond the evidence that was presented in this case. [¶] So based on all of that, . . . I find good cause and that . . . [the] demonstrable reality standard has been shown in this case in light of the entire record." The court dismissed Juror No. A61 and replaced him with an alternate juror.

E. *Verdict and Sentence*

After Juror No. A61 was replaced, the jury began deliberations anew. The jury acquitted defendant of the charge of kidnapping with intent to commit rape but convicted him of the lesser included offense of simple kidnapping. The jury also convicted him of forcible rape and found true the allegations he had kidnapped his victim and moved her a

substantial distance, substantially increasing the risk of harm over and above the level necessarily present in the commission of the rape.

The trial court sentenced defendant to state prison for 25 years to life. Defendant timely appealed.

II. DISCUSSION

A. *Standard of Review*

Under Penal Code section 1089, the trial court has authority to discharge a juror "[i]f at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty . . . ." (See *People v. Cleveland* (2001) 25 Cal.4th 466, 474–475 (*Cleveland*).) " 'We review for abuse of discretion the trial court's determination to discharge a juror and order an alternate to serve.' " (*People v. Williams* (2001) 25 Cal.4th 441, 448.)

As our Supreme Court has explained, however, our review of a trial court's decision to discharge a juror is governed by a " 'heightened standard [that] more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.' [Citations.] Specifically, the juror's 'inability to perform' his or her duty 'must appear in the record as a demonstrable reality.' " (*People v. Armstrong* (2016) 1 Cal.5th 432, 450 (*Armstrong*).) The demonstrable reality test " 'entails a more comprehensive and less deferential review' " than substantial evidence review and " 'requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [good cause for removing the juror is] established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.' " (*Id*. at pp. 450–451; *People v. Salinas-Jacobo* (2019) 33 Cal.App.5th 760, 776 (*Salinas-Jacobo*).)

B. *Juror Misconduct*

The trial court gave two reasons for its decision to discharge Juror No. A61: first, he had prejudged the case, and second, he made decisions based on extrinsic information that was not presented during the course of trial. After a careful review, we conclude the trial court's decision was an abuse of discretion because the record does not reflect the juror's inability to perform his role as a juror as a "demonstrable reality."

1. Prejudgment of Case

Our courts have repeatedly recognized jurors often enter deliberations with strong feelings or opinions about their view of the case. (See *People v. Allen and Johnson* (2011) 53 Cal.4th 60, 75 (*Allen*); *People v. Bowers* (2001) 87 Cal.App.4th 722, 734 ["It is not uncommon for a juror (or jurors) in a trial to come to a conclusion about the strength of a prosecution's case early in the deliberative process . . . ."].) This is not problematic in itself—a problem arises when a juror refuses to participate in deliberations, to listen to fellow jurors, and remain open to evaluating their own opinions. As our Supreme Court observed: "The reality that a juror may hold an opinion at the outset of deliberations is, as we have noted [citation], reflective of human nature. It is certainly not unheard of that a foreperson may actually take a vote as deliberations begin to acquire an early sense of how jurors are leaning. We cannot reasonably expect a juror to enter deliberations as a *tabula rasa*, only allowed to form ideas as conversations continue. What we can, and do, require is that each juror maintain an open mind, consider all the evidence, and subject any preliminary opinion to rational and collegial scrutiny before coming to a final determination." (*Allen*, at pp. 75, 73 ["A juror who holds a preliminary view that a party's case is weak does not violate the court's instructions so long as his or her mind remains open to a fair consideration of the evidence, instructions, and shared opinions expressed during deliberations."]; see *Cleveland*, *supra*, 25 Cal.4th at p. 485 [example of refusal to deliberate includes "expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view"].)

Here, though one juror said Juror No. A61 *stated* he had already made up his mind at the beginning of deliberations, the record as a whole does not reflect that was the

demonstrable reality. (See e.g., *People v. Bowers*, *supra*, 87 Cal.App.4th at pp. 726, 732–735 [though several jurors testified juror made up his mind at beginning of deliberations, conflicting testimony about level of juror's participation did not reflect a demonstrable reality he was unable to perform his duty as a juror].) Juror No. A43 testified that Juror No. A61 stated "clearly" on the first day of deliberations that he had made up his mind and it was not going to change. Juror No. C26 said Juror No. A61 stated his opinion on the first day in the first conversation around the table that the sex was consensual and then said, "I don't *think* I can be shaken from this." (Italics added.) Several other jurors expressed their *beliefs* Juror No. A61 had his mind made up from the beginning of deliberations. One juror expressly disagreed that Juror No. A61 failed to follow the court's instructions. As we will explain, given this range of responses, we find several problems with the trial court's finding that Juror No. A61 prejudged the case.

First, much of the "evidence" that Juror No. A61 prejudged the case consisted of statements from other jurors expressing their own opinion he had done so. Juror No. C28 said, "I don't *feel* that he began deliberations—I *believe* he began deliberations before we were as a group." (Italics added.) Juror No. C26 said, "[I]t *seems* he's made up his mind and he's not letting it go." (Italics added.) Juror No. A10 said, "My *feeling* is this particular juror had already made up their mind before we went into deliberation." (Italics added.) Juror No. B68 said, "I *believe* that he came to a conclusion before we ever deliberated. . . . the first day he *pretty much* had his mind set before we went over the evidence of the case." (Italics added.) As our Supreme Court emphasized in *Allen*, *supra,* 53 Cal.4th at page 75, "We specifically note further that a trial court should be wary of relying on the *opinions* of jurors, rather than on its own consideration of objective facts. . . . In deciding whether to discharge a juror for misconduct, a court should focus on its own consideration of a juror's *conduct.* The court cannot substitute the opinions of jurors for its own findings of fact." Other jurors' *opinions* that Juror No. A61 had already decided the case at the outset of the deliberations is not substantial evidence he had done so.

On the other hand, the evidence regarding Juror No. A61's *conduct* (as opposed to other jurors' conclusory opinions that he had prejudged the case) shows Juror No. A61 engaged actively in deliberations. He said he carefully followed instructions. Juror No. B14 said the jury went "round and round" about Jane Doe's testimony, suggesting her credibility was discussed extensively, including with Juror No. A61. Juror No. C28 said Juror No. A61 told other jurors he considered, reviewed, and looked at issues they raised. Juror No. C26 said, "we did deliberate a fair amount to try and get deeper" and "every time we would make points, that it seemed to cause him pause, *he'd stop, he'd think about it* and then he'd come back, nope. I still see it my way." (Italics added.) The same juror described Juror No. A61 as "really thoughtful" and said the entire jury was a "great group" that was "working together" and "all respectful." And Juror No. B72 believed Juror No. A61 thought "it" through very clearly, reached the decision understanding the instructions, and simply disagreed with the others.

Third, the comments of a number of jurors suggest their opinions that Juror No. A61 prejudged the case were really expressed frustrations with difficult deliberations and differing views of the evidence. (See *Cleveland, supra,* 25 Cal.4th at p. 485 [circumstance that a juror disagrees with majority as to what evidence shows or how law should be applied to facts is not grounds for discharge]; *People v. Elam* (2001) 91 Cal.App.4th 298, 316 [deeper look at other jurors' opinions showed they were based on holdout juror's "failure to *accept* their explanations or to interpret the instructions and evidence as [the other jurors] did"]; *Salinas-Jacobo*, *supra*, 33 Cal.App.5th at p. 780.) Several jurors remarked Juror No. A61 found Jane Doe not credible, did not believe any of her testimony, and believed she consented to sex. One juror said he did not listen well to women. Juror No. A46 suggested Juror No. A61 was driven by "ego versus reason," and said his "defiance doesn't . . . make sense" and "he's not open to the possibility of what 11 other people in that room have come to." But "[j]urors, of course, do not always know what constitutes misconduct." (*People v. Engelman* (2002) 28 Cal.4th 436, 446.) The fact that Juror No. A61 had a different view of the evidence, disbelieved certain witnesses, or did not deliberate well is not evidence of juror misconduct. (*Cleveland*, at

p. 485; *Engelman,* at p. 446 ["the court may not discharge a juror for failing to agree with the majority of other jurors or for persisting in expressing doubts about the sufficiency of the evidence in support of the majority view"]; *Allen, supra,* 53 Cal.4th at p. 74 ["Jurors are supposed to share their own evaluations of the credibility of witnesses and the strength of the evidence. That a given juror may reach a different conclusion on these questions from those espoused by other jurors, or may do so forcefully, is not necessarily evidence of prejudgment or a failure to deliberate."].)

Fourth, the court never asked Juror No. A61 whether he had his mind made up on the first day (or whether he said he did). *People v. Wilson* (2008) 43 Cal.4th 1, cited by the trial court in this case as a basis for its ruling, is instructive. In *Wilson*, the trial court specifically asked the juror accused of prejudgment whether she had already made up her mind. She admitted that she had " 'more or less' made up her mind about penalty and that she was not going to be swayed by further discussion." (*Id.* at p. 24.) Here, Juror No. A61 told the court he followed its instructions carefully, implicitly denying he prejudged the case. But the court's open-ended inquiry to Juror No. A61 about the meaning of the jury note and the court's subsequent refusal to speak with him again after hearing more specific complaints from other jurors did not allow him an opportunity to respond to the particular concern that his mind was made up before deliberations even began.

Fifth, the fact that only *one* juror told the court Juror No. A61 actually said he had made up his mind at the beginning of deliberations is not sufficient in light of the entire record here and the reasons stated by the court for its decision. As discussed above, in conducting our review, we consider not only the evidence in the record, but the *reasons* stated by the trial court to ensure the trial court's decision is " 'manifestly supported' " by evidence on which it *actually relied*. (*Armstrong, supra,* 1 Cal.5th at p. 451.) Here, the trial court stated, "Nine of the jurors repeated the exact same thing, that [Juror No. A61] had reached his decision prior to any deliberations occurring." But as we explained earlier, all nine jurors did *not* state the same thing. Indeed, the Attorney General concedes only five of the jurors raised this issue at all. One juror testified Juror No. A61

said "clearly" he had made up his mind and would not change it; another juror stated Juror No. A61 said he did not "think" he could be "shaken" from his opinion; other jurors said they *believed* he had or *seemed* to have made up his mind; one juror disagreed Juror No. A61 had made up his mind; and several jurors did not even mention that as a basis for saying he failed to follow instructions. In light of this conflicting testimony, we cannot credit the trial court's finding that all nine jurors said "the exact same thing." The trial court also pointed to one juror's comment that Juror No. A61 was speaking in the past tense, "saying, oh, I've already considered that, I've already thought about that, I've already reviewed that. And this was before they had started the deliberations." But in fact, that juror testified Juror No. A61 said those things "when [jurors] raise[d] questions with this individual," suggesting he made those remarks during deliberations in response to specific points, not before deliberations began. Indeed, this testimony arguably demonstrates Juror No. A61 was doing precisely what he was supposed to—considering and responding to other's jurors' arguments.

In sum, given the conflicting evidence contradicting the trial court's finding that nine jurors said "the exact same thing," the trial court's failure to ask Juror No. A61 whether he had made up his mind before beginning deliberations, and the substantial evidence he engaged in extensive discussions and debate with the other jurors but continued to adhere to his own view of the evidence and application of the facts to the law, we conclude the demonstrable reality standard was not met here.

2. Reliance on Extrinsic Evidence

The trial court also found Juror No. A61 relied on evidence outside the record. Specifically, the court said he "relied on his own knowledge and ideas about injuries experienced by porn stars during consensual but rough sex" and "used that information to assess the testimony regarding the SART examination from Mr. Moran." The court concluded that Juror No. A61 had based his decision on prior articles he had read and speculation he imagined that was not in evidence.

The jurors' comments, however, do not support these findings. Juror No. A43 testified Juror No. A61 cited his own "personal experience" or "just input as a juror that

he knows things like that [(presumably genital injuries)] can happen with porn stars." But the same juror said when the other jurors addressed whether or not that was appropriate, Juror No. A61 said it was a mistake and the jury did not talk about it anymore. When asked by the court to clarify, Juror No. A43 explained that Juror No. A61 said, "porn stars sometimes find themselves with their genitals in that state" but when the jury pushed him that porn stars are not a "common situation," he *retracted the comment*, saying he got that from something he read somewhere else. Juror No. B54 stated Juror No. A61 was using information not included in the evidence to say the sex was consensual and gave as an example his belief that Jane Doe was "feeble-minded" and was talked into sex. He also stated Juror No. A61 used something he read before trial that spoke to tearing in the SART exam as being equated to rough sex. Juror No. C28 said Juror No. A61 had the "belief" Jane Doe's injury had been seen in people who star in pornographic films. Two other jurors, Jurors Nos. C26 and A10, made general comments that Juror No. A61 relied on information outside the scope of evidence introduced at trial.

Based on this record, the evidence shows Juror No. A61 made a comment about porn stars having injuries similar to that shown in Jane Doe's SART exam based on something he read before trial. But Juror No. A43 said he retracted the comment, and the jury did not discuss the issue again. No juror testified that Juror No. A61 used information he read about porn stars in evaluating Moran's testimony as the trial court found.[1] Further, the trial court did not question Juror No. A61 directly about whether he relied on information outside the evidence in reaching his decision. Juror No. A61 also stated he followed the court's instructions, which included admonitions not to rely on outside information, and there is no substantial evidence in the record to show otherwise. (See *Salinas-Jacobo*, *supra*, 33 Cal.App.5th at p. 778.)

In reaching our conclusion, we are mindful of the difficulty of the task before trial courts in a situation of alleged juror misconduct. As our Supreme Court has observed,

[1] Juror No. B14 testified Juror No. A61 did not treat the expert witness, Moran, as an expert because he was not asked about consensual sex.

"Determining whether to discharge a juror because of the juror's conduct during deliberations is a delicate matter, especially when the alleged misconduct consists of statements made during deliberations." (*Cleveland, supra*, 25 Cal.4th at p. 484; *Shanks v. Department of Transportation* (2017) 9 Cal.App.5th 543, 555 [court "must investigate the possibility of [juror] misconduct but not overstep and invade the sanctity of the jury's deliberations"].) Nonetheless, we are also cognizant that such inquiries are subjected to a higher standard of review precisely because they concern fundamental safeguards and constitutional rights. (See *Armstrong, supra*, 1 Cal.5th at p. 454 [exercise of trial court's discretion to remove seated juror for failure to deliberate must be undertaken with great care because it implicates defendant's constitutional right to unanimous decision by the jury]; *Allen, supra*, 53 Cal.4th at p. 71.) In this case, we appreciate the trial court's earnest efforts to deal with such a quandary and acknowledge the difficulty of the inquiry she had to conduct. As the record does not demonstrate Juror No. A61 was unable to perform as a juror as a demonstrable reality, however, we are compelled to reverse. Because we determine the trial court erred under California law, we need not reach defendant's constitutional claims. (See *Allen*, at p. 65.) Further, in light of the reversal, we need not address defendant's remaining claims.[2]

III. DISPOSITION

The trial court abused its discretion in dismissing Juror No. A61. The error was prejudicial and mandates reversal of the judgment. (*Cleveland, supra*, 25 Cal.4th at p. 486.) There is no double jeopardy bar to retrial. (See *Armstrong, supra*, 1 Cal.5th at p. 454.)

[2] Defendant also asserted the jury's verdict on the rape charge was not supported by substantial evidence, the trial court committed reversible error by failing to instruct with CALCRIM No. 359, and defendant was entitled to presentence conduct credits.

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Margulies, J.

We concur:

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Humes, P. J.

_____
Banke, J.

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